SIA SIEW HONG & ORS.

v.

LIM GIM CHIAN & ANOR.

COURT OF APPEAL, KUALA LUMPUR
DATUK SHAIK DAUD ISMAIL JCA
TUAN GOPAL SRI RAM JCA
DATO' SITI NORMA YAAKOB JCA
[CIVIL APPEAL NO. W-02-157-1994]
10 AUGUST 1995

CONTRACT: *Respondents charging land to enable appellants' company to obtain loan from bank - Appellants providing security in return for the charge - Appellants executing document described as guarantee in favour of the respondents - Construction of document - Whether guarantee or indemnity - Consideration of ss. 77 & 79 of the Contracts Act 1950.*

LIMITATION: *Appellants providing indemnity against default of third party - Respondents' land charged as security for loan granted to third party - Directors of third party guaranteed loan repayment - Default by third party - Foreclosure and sale of charged land - Whether time begins to run from date of default or from date of sale of charged land - Consideration of s. 6 of the Limitation Act 1953 - Consideration of s. 266 of the National Land Code 1965.*

The appellants were the directors and shareholders of a company (the company). The company was in need of funds and applied for a loan. The lender required the loan to be secured by a charge over land and the appellants approached the respondents for this purpose. The respondents agreed to charge their land to the lender in return for the appellants executing a document titled a "Guarantee" to secure the due performance by them of the terms of the loan agreement which they had with the lender.

The company defaulted in the payment of the loan and the respondents' land was sold by way of public auction. The respondents filed the present claim based on the document signed by the appellants. On the hearing of the application for summary judgment, the learned Judicial Commissioner found that the company had breached the terms of the loan agreement in May 1992 and as a consequence the respondents' claim was not filed out of time as alleged by the appellants. The appellants appealed to the Court of Appeal.

Held:

Per Gopal Sri Ram JCA (delivering the judgment the Court):

[1] In the construction of contracts the Court is not bound by the labels that the parties choose to affix onto the particular document. The duty of the Court is to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport. In the present case the document executed by the appellants, when properly construed, appears to come within the definition contained in s. 77 of the Contracts Act 1950 and in the circumstances the said document must be construed to be an indemnity rather than a guarantee.

[2] The general rule governing the limitation of actions for breach of contract may be displaced by a contrary intention evinced by the parties in a particular case. In the present case the main aim or object of the transaction in question is that the appellants should keep the respondents safe and harmless against the loss of the latter's property by reason of any default of the obligations the company owed the lender. Having regard to the true nature of the document in this case the general rule governing the limitation of actions does not apply in this case as it has been excluded by the true nature of the contract made between the appellants and the respondents.

[3] Since the promise made by the appellants to the respondents was to indemnify the latter against the loss of the charged property, time began to run against the respondents only from the date on which that loss was suffered and not a moment before which was when the property was no longer available to be redeemed in accordance with law.

[4] It is clear that the respondents' land was lost to them when it fell under the hammer at the public auction conducted pursuant to the order of the High Court made on 9 August 1993. The writ having been filed within six years from the said date, the respondents action was not barred by limitation. Since limitation was the sole ground upon which the appellants resisted the summons for judgment, the learned Judicial Commissioner was right in holding that there were no triable issues and in entering summary judgment against the appellants.

[5] The conclusion of the learned Judicial Commissioner that the company breached the terms of the loan agreement only in May 1992 and that time began to run against the respondents from that date was not supported by the evidence and was fatally flawed. However this did not determine the matter in the appellants favour as the appeal is by way of a rehearing

and this Court is entitled to arrive at the same conclusion as the High Court but for reasons entirely different from those expressed by the learned Judicial Commissioner.

[Appeal dismissed with costs]

***[Bahasa Malaysia** Translation of Headnotes]*

***KONTRAK:** Responden menggadaikan tanah bagi membolehkan syarikat perayu mendapatkan pinjaman daripada bank - Perayu memberikan jaminan sebagai balasan bagi gadaian - Perayu menyempurnakan dokumen yang diterangkan sebagai gerenti atas nama responden - Tafsiran dokumen - Samada suatu gerenti atau indemniti - Pertimbangan ss. 77 & 79 Akta Kontrak 1950.*

***PENGHADAN:** Perayu memberikan indemniti terhadap keingkaran pihak ketiga - Tanah responden digadai sebagai jaminan bagi pinjaman yang diberikan kepada pihak ketiga - Pengarah-pengarah pihak ketiga menggerentikan pembayaran balik pinjaman - Keingkaran oleh pihak ketiga - Halang tebus dan penjualan tanah yang tergadai - Samada masa mula dikira dari tarikh keingkaran atau dari tarikh penjualan tanah yang tergadai - Pertimbangan s. 6 Akta Penghadan 1953 - Pertimbangan s. 266 Kanun Tanah Negara 1965.*

Perayu merupakan pengarah-pengarah serta pemegang-pemegang saham sebuah syarikat (syarikat tersebut). Syarikat tersebut memerlukan wang dan telah memohon untuk mendapatkan pinjaman. Pemberi pinjaman menghendaki supaya pinjaman tersebut dijamin oleh satu gadaian dan perayu telah mendatangi responden bagi tujuan yang sama. Responden telah bersetuju untuk menggadaikan tanah mereka kepada pemberi pinjaman sebagai balasan bagi perayu tersebut menyempurnakan satu dokumen yang bertajuk satu "Gerenti" bagi menjamin perlaksanaan oleh mereka akan terma-terma perjanjian pinjaman yang telah mereka masuki dengan pemberi pinjaman tersebut.

Syarikat tersebut telah memungkiri pembayaran pinjaman dan tanah responden telah dijual melalui perlelongan awam. Responden telah memfailkan tuntutan semasa ini berdasarkan dokumen yang telah ditandatangani oleh perayu. Ketika perbicaraan permohonan untuk penghakiman terus, Pesuruhjaya Kehakiman yang bijaksana mendapati bahawa syarikat tersebut telah memungkiri terma-terma perjanjian dalam bulan Mei 1992 dan akibat daripada itu tuntutan responden telah tidak difailkan di luar masa sepertimana yang dikatakan oleh perayu. Perayu telah merayu kepada Mahkamah Rayuan.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Dalam pentafsiran kontrak-kontrak Mahkamah tidak terikat dengan apa-apa panggilan yang dipilih oleh pihak-pihak yang berkaitan terhadap sesuatu dokumen. Tugas Mahkamah adalah untuk mentafsirkan dokumen tersebut keseluruhannya dan menentukan daripada bahasanya dan lain-lain keterangan yang boleh diterima akan sifatnya yang sebenar dan yang dikatakan. Dalam kes semasa ini dokumen yang disempurnakan oleh perayu, apabila ditafsirkan dengan cara yang wajar, kelihatan berada dalam definasi yang terkandung dalam s. 77 Akta Kontrak 1950 dan dalam keadaan sedemikian dokumen tersebut haruslah ditafsirkan sebagai satu indemniti daripada suatu gerenti.

[2] Kaedah am yang menguasai tindakan-tindakan penghadan bagi kemungkiran kontrak mungkin boleh ditolak oleh satu niat yang bertentangan yang dikemukakan oleh pihak-pihak tersebut dalam sesuatu kes yang khusus. Dalam kes semasa, matlamat atau tujuan utama transaksi yang dipersoalkan adalah bahawa perayu haruslah menjaga keselamatan responden terhadap kehilangan harta pihak yang terkemudian itu yang disebabkan oleh apa-apa kemungkiran kewajipan oleh syarikat tersebut kepada pemberi pinjaman. Menimbangkan sifat sebenar dokumen tersebut dalam kes ini, kaedah am yang menguasai tindakan-tindakan penghadan tidak terpakai dalam kes ini kerana ianya telah terkeluar oleh kerana sifat sebenar kontrak tersebut yang telah dibuat antara perayu dan responden.

[3] Oleh kerana janji yang dibuat oleh perayu kepada responden adalah untuk menanggung rugi pihak yang terkemudian itu terhadap kerugian hartanah yang digadaikan tersebut, masa akan hanya mula bergerak terhadap responden daripada tarikh bilamana kerugian itu dialami dan tidak sebelum itu yang mana ketika hartanah tersebut tidak lagi boleh ditebus menurut undang-undang.

[4] Ianya jelas tanah responden telah pun hilang apabila perlelongan awam dijalankan selaras dengan perintah Mahkamah Tinggi yang dibuat pada 9 Ogos 1993. Writ tersebut setelah difailkan dalam tempoh enam tahun daripada tarikh tersebut, menjadikan tindakan responden itu tidak terhalang oleh penghadan. Oleh kerana penghadan merupakan satu-satunya alasan di atas mana perayu menolak saman untuk penghakiman, maka Pesuruhjaya Kehakiman adalah betul dalam memutuskan bahawa tidak terdapat isu-isu yang boleh dibicarakan serta adalah betul dalam memasukkan penghakiman terus terhadap perayu.

[5] Keputusan Pesuruhjaya Kehakiman bahawa syarikat tersebut telah memungkiri terma-terma perjanjian pinjaman hanya dalam bulan Mei 1992 dan bahawa masa mula bergerak terhadap responden daripada tarikh itu

telah tidak disokong oleh keterangan dan adalah cacat dengan cara yang memudaratkan. Walaubagaimanapun keadaan ini tidak menentukan perkara tersebut memihak kepada perayu kerana rayuan tersebut adalah melalui satu perbicaraan semula dan Mahkamah ini adalah berhak untuk mencapai keputusan yang sama seperti yang telah dicapai oleh Mahkamah Tinggi tetapi atas alasan-alasan yang berbeza daripada yang dinyatakan oleh Pesuruhjaya Kehakiman yang bijaksana tersebut.

[Rayuan ditolak dengan kos]

Cases referred to:

Addiscombe Garden Estates Ltd. v. Crabbe [1958] 1 QB 513; [1957] 3 All ER 563; [1957] 3 WLR 980 ***(foll)***

Alfred Templeton & Ors. v. Low Yat Holdings Sdn. Bhd. & Anor. [1989] 2 MLJ 202 9 ***(refd)***

Bolo v. Koklan AIR [1930] PC 270 ***(foll)***

Glynn v. Margetson & Co. [1893] AC 351 (HL); [1892] 1 QB 337 (CA) ***(foll)***

Keng Huat Film Co. Sdn. Bhd. v. Makhanlall (Properties) Pte Ltd. [1984] 1 MLJ 243 ***(foll)***

Koh Siak Poo v. Perkayuan OKS Sdn. Bhd. & Ors. [1989] 3 MLJ 164 ***(foll)***

Loh Wai Lian v. SEA Housing Corp. Sdn. Bhd. [1987] 2 MLJ 1 ***(foll)***

M&J Frozen Food Sdn. Bhd. v. Siland Sdn. Bhd. [1994] 1 MLJ 294 ***(foll)***

Nasri v. Mesah [1971] 1 MLJ 32 ***(dist)***

Rasiah Munusamy v. Lim Tan & Sons Sdn. Bhd. [1985] 2 MLJ 291 ***(foll)***

Legislation referred to:

Contracts Act 1950, ss. 77, 79
Limitation Act 1953, s. 28(5)
National Land Code 1965, s. 266
Rules of the High Court 1980, O. 14
Housing Developers (Control and Licensing) Rules 1970

For the appellants - Alvin John; M/s. Adam & Co.
For the respondents - Chang Kah Ling; M/s. Anthony Ng & Co.

JUDGMENT

Gopal Sri Ram JCA:

This appeal was heard and dismissed on 6 June 1995, without calling upon Counsel for the respondents to reply. My reasons for the decision reached now follow.

Siah Teong Loo & Sons Sdn. Bhd. ('the company') is a private limited company. At all material times, the appellants were its shareholders and directors. It is their family company. Encik Alvin John who appeared for the appellants, after narrating these facts, conceded, in response to a question put by me, that the appellants are in truth the alter ego of the company.

The company was in need of funds. It applied for a loan to Interfinance Bhd. ('the lender'). The lender agreed to grant a loan. One of the conditions of the loan was that there should be security in the form of a charge over land. The respondents had a piece of land. The appellants approached the respondents and asked them to create a charge in favour of the lender to secure the loan. The respondents agreed. But they required some security of the appellants that the loan will be repaid. The appellants agreed to provide a guarantee to secure the due performance by them of the terms of the loan agreement which they had with the lender.

On 9 October 1984, the appellants executed a guarantee in favour of the respondents. It is a document of great importance and for that reason it is best that I reproduce the whole of it here.

Guarantee

To:
Lim Gim Chain and Lim Kim Lian (f)
both of No 69, Jalan Tiga,
Taman Midah,
Off Jalan Cheras,
Kuala Lumpur.

In consideration of both of you at our request entering into agreement of same date with Interfinance Bhd. (hereinafter called 'the lender') as the chargors thereunder and having agreed as registered co-proprietors to have your property held under CT No. 268, s. 65 in the town and district of Kuala Lumpur (hereinafter called 'the said property') charged to the lender as security for the benefit of and/or for the use of Siah Teong Loo & Sons Sdn. Bhd. a private limited Company incorporated and carrying on business in Malaysia with its registered office at No. 22-3, Jalan Segambut, Kuala Lumpur as at 12 December 1983 (hereinafter called 'the borrower') we the undersigned:

1. Sia Siew Hong @ Siah Cheng Kim
2. Chia Ching Hoo
3. Siah Teong Loo @ Chia Chong Loo

do hereby **jointly and severally** guarantee payment in the event of the borrower's default in its repayment of the loan secured by the said property taken from the lender of all moneys and liabilities to the extent of Ringgit Malaysia two hundred and fifty thousand (RM250,000) only (hereinafter referred to as 'the loan') whether certain or contingent now or hereafter owing or incurred to the lender from or by the borrower on any account or in any manner whether as principal or surety and whether alone or jointly with any other persons and in whatever name style or firm including:

(a) in the event of the winding up of the borrower or the borrower being in receivership, all sums which would at any time have been owing and due to the lender by the borrower;

(b) all money obtained from or liabilities incurred to the lender notwithstanding that the borrowing or incurring of such liabilities may be invalid or in excess of the powers of the borrower or of any director attorney agent or other purporting to borrow or act on behalf of the borrower and notwithstanding any other irregularity in such borrowing or incurring such liabilities;

together with interest on all such debts and liabilities to the date of payment, commission charges legal and other costs charges and expenses whether incurred in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment of all or any part of the money hereby guaranteed or otherwise howsoever. **Such debts shall be deemed to be owing from us as principal debtor/s to you notwithstanding any defect informality or insufficiency in the borrowing powers of the borrower or in the exercise thereof which might be a defence as between the borrower and the lender provided that the total sum recoverable from us hereunder is limited to the sum of Ringgit Malaysia two hundred and fifty thousand (RM250,000) only owing or incurred to the lender as aforesaid at the date that demand for the same is made by the lender or discontinuance by any names of this guarantee by us or by our executors administrators or legal representatives howsoever such sum is arrived at with interest thereon at the rate of fifteen point five per centum (15.5%) per annum to be calculated on the amount outstanding or such other rate that may be varied by the lender.** The guarantee is to be a continuing guarantee and is to continue to be binding notwithstanding any change by amalgamation reconstruction or otherwise or whether the borrower may be up or in receivership (Emphasis is added)

This guarantee may be enforced by either of you both at any time.

Dated this 9 October 1984

-Sgd-

At this stage, I digress from the narrative to deal with the nature of this document.

No doubt it is described as a guarantee. But in the construction of contracts the Court is not bound by the labels that parties choose to affix onto the particular document. In all such cases the duty of the Court is clear. And that duty is to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport. As Jenkins LJ observed in *Addiscombe Garden Estates Ltd. v. Crabbe* [1958] 1 QB 513 at p. 528; [1957] 3 All ER 563 at p. 570; [1957]3 WLR 980 at p. 991:

> ... the relationship is determined by the law, and not by the label which the parties choose to put on it, and that it is not necessary to go as far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties.

Although the contract in the present appeal is termed a guarantee by the parties thereto, the document when read as a whole appeared to me in truth to be an indemnity. When I put this Encik John during his argument, he readily agreed that the document was indeed an indemnity and not a guarantee. I think that Counsel was right in the concession he made. However, since the issue is one of law that relates to the nature of a document, it behoves me to deal with the matter quite independently of any concession by Counsel.

The Contracts Act 1950 defines contracts of indemnity and contracts of guarantee in the following way:

> 77 A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called 'a contract of indemnity'.
>
> ...
>
> 79 A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default.

The 'guarantee' when properly construed appears to come within the definition contained in s. 77 rather than that set in s. 79. In the first place, there is no obligation upon the respondents to make a formal demand of the appellants of the sum in question. This feature, standing on its own may not be sufficient to conclude that the document is not a guarantee: for a document which does not contain an 'on demand' clause may nevertheless be a guarantee. However, in my judgment, it is a matter that may be taken into account in determining the true effect of a contract of this nature.

Secondly, the deeming provision upon which I have laid emphasis certainly points to the document being an indemnity rather than a guarantee. That clause imposes upon the appellants the primary obligation of a principal debtor and not merely a secondary obligation of a surety. However, I do not by any means rely solely on that provision to come to a concluded view upon the matter.

Thirdly, I turn to consider the objective aim of the transaction as a whole. The law permits such an approach: see *Keng Huat Film Co. Sdn. Bhd. v. Makhanlall (Properties) Pte. Ltd.* [1984] 1 MLJ 243 at p. 247, per Mohamed Azmi FJ. Taking into account all the relevant circumstances, it is quite clear that the parties intended that the appellants should assume the primary obligation to indemnify the respondents in the event of a default by the company. In effect, the appellants were saying to the respondents, 'Put you property at risk for us and we will pay you if it is lost'. Thus stated, the objective aim of the transaction points to the document being an indemnity rather than a guarantee.

Fourthly, there is the last clause in the document which reads: 'This guarantee may be enforced by either of you or both at any time.' This clause appears to point to the appellants agreeing to undertake an original liability, irrespective of any default on the part of the company.

Each of the factors to which I have alluded, standing on its own, may be insufficient to support a conclusion that the document in question is an indemnity. But I do not base my conclusion on a single factor. Instead, I have had regard to all of them. In arriving at my conclusion that the document is an indemnity and not a guarantee, I have had regard to several matters. This includes the language used by the parties and the objective aim of the transaction. I have carefully weighed those considerations which point to the document being a guarantee against those which point in the direction of it being an indemnity. Having given the matter my most anxious consideration, my initial view, namely, that this document is an indemnity, remains unchanged.

I now return to the narrative. The company failed to meet its commitment to the lender. On 23 September 1985, the lender's solicitors wrote to the respondents informing them of the company's (in effect the appellant's) breach of the terms of the loan agreement and putting them on notice that foreclosure proceedings would be instituted unless repayment was made.

Obviously, the appellants did nothing to placate the lender. So the lender got its solicitors to write two letters to the respondents. The first of these is dated 25 October 1985. It makes a formal demand of the respondents to pay the sum due from the company to the lender. The second is dated 21 December 1985 and encloses the notice in Form 16D provided for by the National Land Code 1965 in cases of breach of the terms of a charge.

The breach adverted to in Form 16D not having been remedied, the lender instituted foreclosure proceedings and, on 21 August 1986, obtained an order directing the sale of the respondents' land by public auction. The respondents' land was sold by public auction on 9 August 1993 for RM274,000. This sum was credited by the lender to account of the loan. The upshot was that the respondents, who had not stood to gain a single sen from the transaction, lost their property. Additionally, as if to rub salt into a wound, the lender's solicitors, on 5 July 1994, wrote to the respondents demanding payment of RM616,754.57 being the outstanding sum due from the company to the lender.

On 24 March 1994, the respondents caused to be issued a writ, accompanied by a statement of claim, claiming a sum of RM250,000 on the footing that the appellants were liable under the terms of the document dated 9 October 1984. On 24 June 1994, the appellants delivered their defence in which the only issue of any substance raised was that the respondents' claim was barred by limitation. On 11 August 1994, the respondents took out a summons for judgment under O. 14 of the Rules of the High Court 1980. The respondents led evidence by affidavit to show that as late as 1992 the company continued

to make payments to the lender towards the balance outstanding after the sale by public auction of the respondents' property. The second appellant delivered an affidavit on behalf of himself and all the other appellants in opposition to the respondents' summons. In it, he once again contended that the respondents' action had been barred by limitation.

The respondents' summons came on for hearing before the learned judicial commissioner on 12 to 26 September 1994. Arguments were confined to the issue of limitation. At the conclusion of submissions, the learned judicial commissioner reserved his decision to 30 September 1994, on which date he granted the respondents leave to enter summary judgment. His written judgment contains the following reasons for the decision he arrived at:

> Pada mula pembicaraan kandungan 5 [the summons for judgment] pada 12 September 1994, beberapa isu telah ditimbul dan dihujahkan oleh kedua-dua pihak. Antara lain, isu kelewatan membawa permohonan di bawah A. 12 k. 1 dibangkitkan oleh peguam bagi pihak defendan-defendan berasaskan kes *Krishnamurthy & Anor. Malayan Finance Corp. Bhd.* [1986] 2 MLJ 135 di ms. 135. Dengan tujuan mengambil tindakan susulan tertentu, kedua-dua pihak memohon penangguhan singkat. Saya membenarkan permohonan mereka dan menetapkan sambung bicara permohonan ini pada 26 September 1994 pukul 2.30 petang.
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> Pada 26 September 1994 kedua-dua pihak bersetuju isu tunggal yang perlu diputuskan oleh saya ialah bilakah mulanya hak menuntut ganti bayar di bawah LGCI [the guarantee in question] bermula dari segi 6 Akta Had Masa 1953.
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> ...
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> Penelitian rapi saya kapada tujuan dan maksud isi kandungan LGCI memberi maksud bahawa defendan-defendan adalah bertanggungjawab membayar ganti kepada plaintif-plaintif sejumlah yang diperuntukkan di dalam LGCI itu. Liabiliti mereka menjadi kenyataan apabila peminjam mengingkari mereka terhadap pemberipinjam. Soalannya ialah: 'Bilakah peminjam mengingkari membuat sedemikian?'
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> Berpandu kepada CCHI (the letter from the lender's solicitors dated 23 September 1985), adalah jelas mereka melakukannya seawal 23 September 1985 dan selewat-lewatnya pada 26 Ogos 1986. Jika tiada LGC3 (the statement of account issued by the lender), hujah sedemikian bolehlah diterima sebagai benar dan tepat. Jika sedemikian dan bagi tujuan s. 6(1) Akta berkenaan, kes *Bank Bumiputra Malaysia Bhd v. Fu Lee Development Sdn. Bhd. & Ors.* [1991] 2 MLJ 202 menjadi relevan dan plaintif-plaintif adalah dihalang untuk membuat tuntutan berasaskan kepada s. 6(2) Akta yang sama tetapi dalam permohonan ini, pihak pemohon mengemukakan eks LGC3 dan LGC4
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> Memang benar pemberipinjam menuntut peminjam seperti terbukti oleh CCHI, tetapi daripada LGC3, kesimpulan yang boleh saya buat ialah peminjam masih lagi melakukan obligasi mereka terhadap pemberipinjam. Mereka masih membayar dan pemberipinjam menerima bayaran mereka. Tanpa bukti sebaliknya, pembayaran

itu boleh diputuskan sebagai bayaran terhadap atau mempunyai hubungkait dengan tuntutan yang dibuat melalui CCHI. Hanya apabila peminjam mengingkari seperti ditunjukkan oleh LGC3 itu, barulah pemberipinjam menuntut plaintif-plaintif melalui LGC4.

Kesimpulan yang boleh dicungkil daripada LGC4 ialah, tuntutan tersebut dibuat kerana selepas tarikh Mei 1992, peminjam mulai ingkar memenuhi obligasi mereka kepada pemberipinjam. Dalam keadaan sedemikian, terpulanglah kepada pemberipinjam untuk menuntut hutang berkenaan daripada peminjam atau plaintif-plaintif. Dalam kes ini, mereka memilih menuntut daripada plaintif-plaintif. **Dengan itu, dalam konteks LGC1 dan keadaan sedemikian, bolehlah diputuskan bahawa peminjam benar-benar mengingkari memenuhi obligasi mereka mulai Mei 1992 seperti dibuktikan oleh LGC3. Mengikut peruntukan LGC1, mulai tarikh sedemikian defendan-defendan adalah bertanggungjawab kepada plaintif-plaintif untuk membayar ganti seperti tercatat di dalam LGC1.**

Berpremiskan analisa di atas, saya memutuskan bahawa plaintif-plaintif tidak dihalang oleh s. 6(2) Atka Had Masa 1953 menuntut apa yang diperuntukkan di dalam LGC1.

Oleh kerana defendan-defendan tidak mempunyai pembelaan terhadap tuntutan tersebut atas sebab-sebab yang telah saya huraikan di atas, saya membenarkan permohonan plaintif-plaintif seperti dipohon melalui kandungan 5. (Emphasis added.)

Encik John, not without justification, criticized the finding of the learned Judicial Commissioner to which I have lent emphasis in the foregoing passage. By no stretch of the imagination can it be said, on the undisputed facts of the case as narrated above, that the company breached the terms of the loan agreement only in May 1992. Equally, the conclusion of the learned Judicial Commissioner that time began to run against the respondents from the said date is fatally flawed. It will appear later why this is so.

However, a finding by this Court that the learned Judicial Commissioner erred in the reasons for his decision does not necessarily determine the matter in the appellants' favour. For, this appeal is by way of a rehearing (see *Koh Siak Poo v. Perkayuan OKS Sdn. Bhd.* [1989] 3 MLJ 164 at p. 165) so that this Court is entitled to arrive at the same conclusion as the High Court but for reasons entirely different from those expressed by the learned Judicial Commissioner. The question whether the respondents' action is barred by limitation must, in my judgment, be resolved by reference to those principles that govern the barring of actions by the passage of time in relation to the nature of the liability undertaken by the appellants. If, upon an application of the correct principles to the circumstances of this case, it is found that the respondents' action was not barred by limitation when their writ was issued, then it matters not a jot that the learned Judicial Commissioner entered judgment in the respondents' favour for the wrong reasons. His ultimate decision must be upheld.

It is convenient to begin with the proposition that statutes of limitation do not begin to operate unless a cause of action becomes vested in the plaintiff. In the words of Sir Binod Mitter in *Bolo v. Koklan* AIR 1930 PC 270 at p. 272:

> There can be no 'right to sue' until there is an accrual of, the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

As a general rule, in actions for breach of contract, time under the Limitation Act 1953 begins to run from the date of its breach. *Nasri v. Mesah* [1971] 1 MLJ 32 is authority for that proposition. In that case, Gill FJ (as he then was), after citing the foregoing passage in *Bolo v. Koklan* said (at p. 34):

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v. Brown* [1888] 22 QBD 128 at p. 131.) In *Reeves v. Butcher* [1891] 2 QB 509 at p. 511 Lindley LJ said:
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> > This expression, "cause of action", has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* LR 4 QB 519, decided in 1843, that cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statue runs from the earliest time at which an action could be brought.
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> In *Board of Trade v. Cayzer, Irvine & Co.* [1972] AC 610 at p. 617, Viscount Dunedin described 'cause of action' as that which makes action possible. **Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J in** *Gibbs v. Guild* 8 QBD 296 at p. 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo's* case). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run. (Emphasis is mine).

But it must always be borne in mind that the question as to when a cause of action arises in relation to the breach of the contract is one that depends for its determination upon the construction of a particular contract. Thus, it may be inappropriate to apply the general rule laid down in *Nasri v. Mesah* where the breach complained of is a continuing one or where the complaint relates to the breach of certain contracts of indemnity.

The true principle that is to be applied appears in the following passage in the judgment of Lord Oliver of Aylmerton in *Loh Wai Lian v. SEA Housing Corp. Sdn. Bhd.* [1987] 2 MLJ 1 at pp. 3-4:

> The use of the word 'indemnity' is significant, for in its natural meaning it imports the notion of compensation for a loss already suffered when the compensation is paid (see, for instance, *Yorkshire Electricity Board v. British Telecom* [1986] 1 WLR 1029 at p. 1034) ...
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> > **... But parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided**. This appeal raises no point of principle but simply a question of what is the true construction of the contract in which the parties entered. In their Lordships' judgment, the only sensible construction of cl. 17 is, as Mr. Kidwell has contended, that it imposes an obligation to pay, in substitution for any other right to damages which the purchaser might otherwise have, a single sum to be calculated and ascertained at a particular date and that until that sum has been ascertained it does not become due and cannot be sued for. (Emphasis is mine)

In *Loh Wai Lian*, the defendant, a licensed housing developer, entered into a written agreement with the plaintiff for the sale and purchase of a shophouse. The agreement contained terms stipulated by the Housing Developers (Control and Licensing) Rules 1970 under which the defendant was obliged to complete the shophouse and have it ready for delivery of possession to the plaintiff not later than 18 months from the date of the agreement. In the event of delay in making delivery on the due date, the defendant was liable to pay to the plaintiff agreed liquidated damages calculated from day to day at the rate of 8% pa on the purchase price until the date of actual delivery. The defendant, on the facts of that case, should have completed the shophouse on 18 September 1975. But this did not happen. Delivery of the shophouse was given to the plaintiff on 7 November 1977. On 9 September 1982, the plaintiff issued a writ claiming damages for delay. The defendant took the point that the cause of action vested in the plaintiff on 18 September 1975, when the period of 18 months had expired and that the writ had come 11 months out of time. This argument succeeded before the High Court whose decision was upheld by the Federal Court. Mohd Azmi FJ (as he then was) who delivered the judgment of the Federal Court in that case referred to *Bolo v. Koklan* and applied the general rule that operates to bar actions for breach of contract. The Privy Council made the remarks I have reproduced above when it reversed the Courts below and held the action in that case not to have been barred by limitation.

Now, I am conscious of the fact that the document that fell for interpretation in *Loh Wai Lian* was a contract of indemnity quite different in its terms from the contract in the present appeal. However, I am not here concerned with such difference. What concerns me is the principle that emerges from a reading of the judgment of the Board in that case. And that principle is that the general rule governing the limitation of actions for breach of contract may be displaced by a contrary intention evinced by the parties in a particular case. That, I apprehend, is the proposition which was overlooked by Counsel and the High Court.

Having said all this, I now turn to consider the sole issue that falls for determination in this appeal, namely, whether the respondents' action was barred by limitation. In my judgment, this issue must be resolved by finding the answers to four questions.

The first question that calls for an answer is this: is the general rule that applies to bar actions for the breach of a contract to be applied to this case, or has that rule been displaced by a contrary intention evinced by the parties?

The appellants rely on the words "in the event of the borrower's default in its repayment" appearing in the document under consideration as fixing the date on which the cause of action vested in the respondents, namely, the date on which the company broke its contract with the lender. The learned Judicial Commissioner appears to have thought along the same lines. Standing alone, these words certainly point to the parties having contracted to apply the general rule of limitation. But the phrase relied upon by the appellants is inconsistent with the final clause in the 'guarantee' and the objective aim of the transaction. In these circumstances, I would apply the salutary rule of construction appearing in the following passage in the speech of Lord Halsbury LC in *Glynn v. Margetson & Co.* [1983] AC 351 at p. 357:

> Looking at the whole of the instrument, and seeing what one must regard for a reason which I will give in a moment, as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract.

In the same case, Fry LJ in the Court of Appeal [1892] 1 QB 337 at p. 344 stated the proposition in far more restrictive terms. This is how he put it:

> I think that principle of construction is not confined to this class of documents, but is applicable to all documents. This principle is applicable wherever specific words are used to express the main object and intent of the instrument, and in some other parts general words are used which in their utmost generality would be inconsistent with and destructive of the main object of the contract.

Although there may not be any practical difference in the application of the principle as stated in either fashion, I would prefer the formulation of the proposition by the Lord Chancellor to that by Fry LJ in the Court of Appeal

for the reason that the former renders the principle more flexible, thereby enabling a Court to do justice between parties.

As earlier observed, the main aim or object of the transaction in question is that the appellants should keep the respondents safe and harmless against the loss of the latter's property by reason of any default of the obligations the company (in truth the appellants) owed the lender. Since the words relied upon by the appellants are inconsistent with that object, no regard should be had to them when determining whether the general rule should apply.

Having regard to the true nature of the guarantee in this case and interpreting it as I do, in the context of this particular case, I am of the view that the general rule to which I have referred does not apply. It has been excluded by the true nature of the contract made between the appellants and the respondents.

The second question that requires an answer is this. Since the general rule does not apply, then, when did time begin to run? Again, that question, I apprehend, must be answered by having regard to the true nature of the promise made by the appellants to the respondents. Since the promise made by the appellants to the respondents was to indemnify the latter against the loss of the charged property, it is my considered judgment that time began to run against the respondents only from the date on which that loss was suffered and not a moment before.

That brings me to the third question. When was the charged property lost to the respondents? The answer to that question must surely be: when it was no longer available to be redeemed in accordance with law.

The answer to the fourth question, when could the property no longer be redeemed, is furnished by the words of s. 266 of the National Land Code 1965 ('the Code'). That section is in the following terms:

> Right of chargor to tender payment at any time before sale.
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> (1) Any chargor against whom an order for sale has been made under this Chapter may, at any time before the conclusion of the sale, tender the amounts specified in sub-section (2) to the Registrar of the Court or, as the case may be, land administrator (or, if the tender is made on the day fixed for the sale, to the office having the direction thereof), and the order shall thereupon cease to have effect.
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> (2) The amounts referred to in sub-section (1) are:
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> (a) the amount shown in the order as due to the chargee at the date on which the order was made;
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> (b) such further amounts (if any) as have fallen due under the charge between the date of the order and the date of the tender; and

(c) an amount sufficient to cover all expenses incurred in connection with the making, or carrying into effect, of the order.

(3) Where any order for sale ceases to have effect by virtue of this section, the Registrar of the Court or, as the case may be, land administrator shall give notice thereof to every chargee of the land or lease in question.

A reading of the plain words of the section makes it clear that it is neither the service of the statutory Form 16D nor the making of the order for sale that extinguishes the right of redemption. That right, to quote the language of the Code, is lost, and the land with it, at 'the conclusion of the sale'.

As to when a sale of land by public auction is concluded, the Supreme Court in *M&J Frozen Food Sdn. Bhd. v. Siland Sdn. Bhd.* [1994] 1 MLJ 294 at p. 303 observed:

> So a reference to a sale being concluded at the fall of the auctioneer's hammer could only refer to that stage of the transaction of sale when there is concluded an agreement between the vendor and the highest bidder, the former to sell and the latter to purchase the goods. Hence the term 'conclusion' in the context of these sections (which include, s. 266(1) of the Code) can only mean conclusion of certain aspects of the sale when there is an agreement between the parties to sell and buy the property but the proprietary right has yet to be conveyed from the vendor to the purchaser (per Wan Yahya SCJ).

I pause to mention that the auctioneer referred to in the judgment of Wan Yahya SCJ is the same person referred to in parentheses in sub-section (1) of s. 266.

It is therefore clear that the respondents' land was lost to them when it fell under the hammer at the public auction conducted pursuant to the order of the High Court made on 9 August 1993. Accordingly, the loss which the respondents were entitled to recover by action upon the contract they had with the appellants occurred on that date and not at any earlier moment in time. The writ having been filed within six years from the said date, the respondents' action was not barred by limitation. Since limitation was the sole ground upon which the appellants resisted the summons for judgment, the conclusion that the action was brought within time really determines the matter in the respondents' favour. Accordingly, the learned Judicial Commissioner was right in holding that there were no triable issues and in entering summary judgment against the appellants.

There is an alternative ground upon which the High Court could have held limitation not to apply in this case, although I do not decide this appeal upon it because it was neither raised nor argued. It has to do with the final clause in the document whereby the appellants agreed that the respondents may enforce the 'guarantee' *at any time*.

Now, that appears to me to be a promise for value by which the appellants bound themselves not to raise limitation as a defence to an action brought to enforce the contract. In such circumstances, it seems quite plain that the appellants ought not to be permitted to go back on their word. It would be quite unjust and inequitable to permit them to do so. Had the point been taken, there would have been no difficulty in holding that the appellants ought to be estopped from pleading the statute. The doctrine of estoppel - whether one calls it promissory estoppel, estoppel by encouragement or estoppel by convention does not really matter - has reached such a stage that it may be used to deprive a litigant of the benefit of a procedural statute such as the Limitation Act 1953. The law upon this subject has been stated by Edgar Joseph Jr. J (as he then was) in *Alfred Templeton & Ors. v. Low Yat Holdings Sdn. Bhd. & Anor.* [1989] 2 MLJ 202 at pp. 244-245. A reading of this Lordship's judgment in that case has left me with the impression that little or nothing may be usefully added to the learning contained therein.

Another way of stating the doctrine when applying it to written law is comprised in the maxim 'equity will not permit statute to be used as an engine of fraud'. It is a doctrine of wide operation its content was explained by Mohamed Azmi SCJ in *Rasiah Munusamy v. Lim Tan & Sons Sdn. Bhd.* [1985] 2 MLJ 291 at p. 296 in the following words:

> It is not fraud in the common law sense, but an unmeritorious and unconscionable conduct which is known as constructive or equitable fraud (see Spry on *Equitable Remedies* (2nd Edn.,) at p. 236).

The doctrine, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon a statutory provision that would defeat his opponent's case. An application of the doctrine requires a meticulous examination of the facts and circumstances of the particular case to determine whether there has been any inequitable conduct. The doctrine has been applied to several statutes, including those governing contracts, wills, trusts and assignments. The categories of statutes to which the doctrine may be applied are not closed and I am certainly unable to find any serious impediment in applying it to bar a litigant from raising and relying upon the provisions of the Limitation Act 1953.

The views I have thus far expressed (apart from the estoppel point) are quite sufficient to determine the event of this appeal. However, there remains the argument of Encik John based upon s. 28(5) on the Limitation Act 1953 which reads as follows:

> A payment made in respect of any debt or other liquidated pecuniary claim shall bind all persons liable in respect thereof:
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> Provided that a payment made after the expiration of the period of limitation prescribed for the beginning of an action to recover the debt or other claim shall not bind any person other than the person making the payment and his

successors, and shall not bind any successor on whom the liability devolves on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the payment.

The reliance of Counsel upon the proviso to the subsection is really in answer to the suggestion made by the respondents in the Court below that the payments made by the company (in reality the appellants) to the lender in 1992 amounted to an acknowledgment of the debt due to the respondents and hence extended the period of limitation. The fallacy in the approach taken by Counsel lies in the fact that the payments were made not to the respondents but to the lender under quite a different contract to which the respondents were not privy. There was no payment made by the appellants to the respondents in 1992 or indeed at any time. Consequently, the question of there being any acknowledgment *inter se* the appellants and the respondents does not arise.

As I have earlier observed, the respondents' action had been commenced well within the time specified by statute. Accordingly, this appeal had to be, and was dismissed with costs and those orders which are usually consequent upon a dismissal were made.

My learned brother, Shaik Daud JCA, the presiding Judge, and my learned sister, Siti Norma Yaakob JCA, the other member of the Court, have seen this judgment in draft and agree with the reasoning and the conclusions therein.

Reported by Satish Nair